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CASES CITED.

IN THE

Supreme Court of the United States

October Term, 1923.

STEFANO SANGUINETTI, *Appellant*,
v.
THE UNITED STATES.
No. 130.

BRIEF FOR APPELLANT.

This suit is a result of the Government's undertaking, by a canal and embankment, to control flood waters in the region of Stockton, California, so as to improve navigation of Stockton River.

The Calaveras River, having a drainage area of about 491 square miles, rises in the foothills of the Sierra Nevada Mountains, to the northeast of Stockton, and flowing in a southwestly direction passes north of that city and empties into the San Joaquin River about two and one-half miles below the mouth of a channel, known as Stockton Channel, some two and one-half miles in length and 150 feet wide, which connects the city directly with the San Joaquin River, a tidal stream flowing into San Francisco Bay; Stockton being a commercial and manufacturing city of, at that time, about 27,000 inhabitants. It is the upper terminal of the greater part of the commerce of the San Joaquin River. Its water-borne commerce amounted to approximately 500,000 tons annually, valued at about $30,000,000. For many years, beginning in 1885, the Government had been attempting to maintain by

dredging, with only partial success, a depth of nine feet at low water in Stockton Channel, the average annual expense incurred being over $7,000 (House Document 256, 65th Congress, 1st Session). At Bellato, about fifteen miles northeast of Stockton, the Calaveras River divides, so that when the water in its bed reaches a sufficient height, the greater part is diverted to the south, through what is known as Mormon Slough. This latter also flows in a generally southwestern direction and up to the winter of 1910–1911 had flowed through the city of Stockton and into said Stockton Channel, the mouth of Mormon Slough, there called Mormon Channel, being near the head of Stockton Channel. In the lower twenty miles of its length the fall of said Mormon Slough, and the slope of the adjacent country flattens, to an average grade of five and one-half feet to the mile, to the west, and in periods of high water is heavily charged with sediment. Prior to the construction of the diverting canal hereinafter referred to the greater part of this sediment was dropped into Mormon Channel at and near its mouth at Stockton, and that sediment which got past its mouth was dropped in Stockton Channel, to the detriment of navigation. The lands directly to the north of the Calaveras River and extending back several miles are what are known as tule lands, that is to say, low lands, reclaimed and protected by dikes or levees. Prior to the construction of the diverting canal neither the land to the north of this river nor the land to the south thereof, and between the river and said Mormon Slough, had ever been subject to injurious overflow by the flood waters of either, or from any other cause; and much of the lands, particularly those hereinafter mentioned, had been for many years under intensive and successful cultivation.

In the years 1903 to 1910, under a direction contained

in the River and Harbor Appropriation Act approved June 13, 1902 (32 Stats. L., Ch. 1079, p. 368), the Corps of Engineers of the War Department, at a point about three and one-half miles east of Stockton, built a dam across Mormon Slough and dug a canal about one hundred and fifty feet wide, seven and nine-tenths feet in depth and about four and one-half miles in length, running in a northwesterly direction from Mormon Slough to the Calaveras River, the purpose being to divert the waters of Mormon Slough to the Calaveras River, so that they would pass into the San Joaquin River below the mouth of Stockton Channel and thus prevent the filling up of said channel and save the cost of dredging it (H. Doc. 256, p. 7). Following is the text of that enactment:

> "For the rectification of the Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon channel into Calaveras River in accordance with the report submitted in House Document numbered 152, Fifty-fifth Congress, third session, fifty thousand dollars: Provided, That a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete said project not to exceed in the aggregate $175,000 exclusive of the amounts herein and heretofore appropriated. Provided further, That the City of Stockton or the State of California shall first furnish to the United States the right of way for said canal" (32 Stats., Part 1, p. 368).

In designing this improvement the army engineers deliberated between two plans. One of these was to lay the canal so wide and dig it so deep that it would contain all the waters of any flood deemed possible. The other plan was to make the canal smaller, so as to take

care of the ordinary spring floods and to supplement it by a levee, on its southwest side, of height and strength sufficient to stop the waters of extraordinary floods and throw them back, across the canal, to the low lands on the other side. The decision was in favor of the latter scheme. A comparatively shallow canal was excavated and the levee built, largely of the material so obtained. The project provided for four highway bridges, crossing the canal, and the elevation of those, with their approaches, was adjusted to the height of the levee. Besides, there was a railroad bridge to be considered, and this was raised by the Government force to such height so as to clear the levee.

A dam, practically a continuation of this levee, at its eastern end, was built across Mormon Slough so as to shut the waters out of the latter and turn them into the canal. To accommodate the flow of the diverted and collected water, with its detritus, the Calaveras River was dredged below the mouth of the canal and the dredged materials were used to widen, raise and strengthen a levee a short distance down the river from that point along the north bank.

The diverting canal with its levee had precisely the effects intended by the army engineers. At times of normal floods it caught the waters which otherwise would have continued to flow onward to Stockton and conducted them directly to the Calaveras River; and in 1911, when the waters exceeded the capacity of the canal and, flowing against the levee, were thrown back across the canal, they rested for the time being upon the farming lands here concerned.

The Solicitor General, already having filed his brief in this court, has thought it worth while to say in the first sentence that this is one of seventy suits originating in the overflows of 1911, involving more than $500,000.

The reasons for the selection of this as a test case are that it relates to lands which abut immediately on the diverting canal and therefore afford the clearest exemplification of the change in the waterflow, and that the damages in suit are of a larger variety than those of any other case and a decision herein will settle most of the other cases. Also—whatever relevance the fact may have—the other suits, as proved, are comparatively insignificant in amount. Their combined total is not much more than the claimant in this case can recover; the parties being mainly tenant farmers whose growing crops were destroyed or injured.

Appellant had some one hundred and forty acres of land south of the canal and levee, but north of the latter he had two tracts aggregating about sixty acres, these latter being [redacted] one hundred feet apart. On the tract lying in the angle indicated there was a two-story residence, with two barns and other outbuildings, and both tracts were in a high state of cultivation, bearing crops, more or less near to maturity, when the most serious of the 1911 floods occurred. All these properties were in a large degree destroyed, or damaged, by that overflow. The growing crops belonged to tenants of claimant, and therefore this suit is confined to injury to the forty acres of the lands, an orchard occupying the twenty remaining acres, and the residence and other buildings.

Assignment of Errors.

Error, committed by the Court of Claims, is assigned hereby as follows:

1. Dismissing the case for want of jurisdiction in the court.

2. Not finding that the United States was and is responsible to appellant for the proved injuries to his property.

3. Not finding that the overflow of appellant's lands, by which the injuries sued on were done, was a proximate and natural effect, for which the United States engineers in charge planned, of the project in question, including a levee along the southern bank of the diverting canal to control the high waters, above the average, which were expected to occur.

4. Not rendering a judgment in appellant's favor.

Propositions.

1. The Government, being seized of a right of way for the diverting canal and levee described in the record, its construction of the same, under general direction of Congress, in such form as necessarily and proximately to damage attingent property, is a taking of that property for public use.

2. If said canal and levee were intentionally coordinated by the authorized officers of the Government with respect (a) to the capacity of the canal and (b) to the position and height of the levee, so that the levee, in cases of very high water expected by the designers, caused the waters to overflow and damage lands on the other side of the canal, the Government is answerable to the land owners for the damage.

3. The War Department having been directed by Congress to construct the improvement in question, a plan for such improvement, framed by the authorized officers of that department of the Government, is the Government's plan.

4. This improvement having been constructed on the plans of the Government's authorized engineers, there is no question here of good or bad engineering, and for any consequences, inherent in the plan, the Government is liable to persons proximately injured thereby.

5. It is the character of an invasion of property

caused by the Government, not the amount of damage resulting from it, in case that damage is substantial, that determines the question whether it is a taking.

(*United States* v. *Cress*, 243 U. S. 328. *United States* v. *Lynah*, 188 U. S. 445. *Heywood's case*, 46 Ct. Cl. 488 and 52 Ct. Cl. 87; 250 U. S., 633.)

6. The effect on appellant's lands of the levee, adjusted to a height of water that occurred the next year after the completion of the improvement, viz., 1911, and again in 1914 (in which year this suit was instituted), and might well have occurred in 1912 and 1913 if those had not been unusually dry seasons, is not a case of temporary flooding or of consequential injury, but a permanent condition.

(*United States* v. *Cress sup.*, p. 327. *Chapman's case*, 33 Ct. Cl. 203. Present record: Findings of fact, p. 10; Opinion of Court of Claims, p. 27.)

Argument.

This case could not better be put at issue than by comment on a few expressions in the Government's brief.

At page 7 of the brief it is said:

> "If the Government engineers failed to take into account the possibility of unusual spring floods, at worst their lack of foresight could only amount to engineering errors or negligence, and the United States is immune from suit by reason of damages due to such error or even negligence.

Firstly, the engineers did take into account the certainty of floods, year by year, of varying heights, and they made provision for all heights, viz., (1) the canal alone for comparatively low waters and (2) the levee for those which would overflow the canal. Secondly, there was no engineering error or negligence; the levee

did precisely what was expected of it; when the waters, from excessive volume, were flowing to the southwest, it threw them back across the canal, onto the lands of appellant and others, and by so doing prevented the submergence of lands extending to Stockton and the drowning and shoaling of Stockton Channel.

> *Brief, p. 8.* "Undoubtedly, when the United States appropriates property for public purposes an implication arises of a contract to pay for the lands thus *intentionally and deliberately* taken."

In the present suit the United States is called on to pay for precisely the thing indicated by the Solicitor General's italics.

> *Brief, p. 9.* "Where, however, the act is due to conditions over which the United States has no control, then there is no ground for the implication [of a promise to pay], even though the Government in its operations may have been a contributary cause."

The Government, in fact, exercised full control over the flood waters. It caused them to flow directly through the diverting canal to the Calaveras River when they were not very high and, when they were very high, to encounter and be arrested by the levee, with the inevitable result of being deposited on the lands beyond the canal.

> *Extract from findings of fact, brief pp. 13, 14.* "The waters flowing in the slough in great volume and to its capacity were diverted by the dam [connecting Mormon Slough with the diverting canal] into the canal except as to some overflow which passed on toward Stockton, and the large volume of water flowing over the country between the slough and the Calaveras was intercepted by the [diverting] canal and the aggregate volume turned

toward the Calaveras, but the volume was in excess of the capacity of the canal and also, when combined with the waters in the Calaveras, in excess of the quantity which could find a ready and rapid outlet down that stream, with the result that, by reason of the excess quantity of water reaching the canal and the retarding of its flow by the waters in the Calaveras, and also, to some extent, by the bridges over the canal, the lands above or to the northeastward of the canal and for the full length thereof were overflowed, the overflow extending in varying depths from one-half to 1 mile, according to the contour of the land, the greatest distance and depth occurring in the pocket formed by the canal levee and the levee on the north bank of the Calaveras, where a lake was formed. The waters flowing in and parallel with the canal, moving in greater volume and with greater force than those in the Calaveras, threw the current of the river to the levee on the north bank and backed up the waters of the Calaveras to the northeast."

The mere physics of the canal overflow, of the stoppage of occasional waters by the levee below the canal and of the submergence of the lands to the northward thereof, are of no consequence provided those particular results were foreseen by the army engineers and the plan was adjusted to them. It is clear that the engineers did expect that practically all of the waters, at any stages, would be turned out of Mormon Channel into the diverting canal and that at times the volume, at and below the mouth of the canal, might be more than the Calaveras River could carry; which latter eventuality was the reason for the building up and strengthening of the old levee, described in the findings, on the north bank of the river. In short, the engineers took into account everything that would contribute to create a height of water, along the diverting canal, for

which the canal itself would be inadequate. Naturally, they built the levee to a height that would take care of the overloads which were expected to occur sometimes in the actual conditions which would obtain upon the completion of the project.

The findings, as quoted in the Government's brief (pp. 14–16), go on to tell of breaks in the levee on the Calaveras River bank, one of them above or opposite the mouth of the canal, and of back water, on the other side of the river, caused partly by an embankment of the Southern Pacific railroad and that low-lying lands for a considerable distance both above and below this break were flooded. Possibly the Government's engineers, taking the Southern Pacific embankment into account, anticipated that an overflow might occur below the mouth of the canal involving a breakage of the levee on the river bank; but certain it is that they computed the levee on the south bank of the canal of strength and height to restrain those particular floods, with the others, so that, along the line of the canal, not a drop of water would pass onward to or toward the city of Stockton, but all would be imposed on the lands along the northeast bank of the canal. Elsewhere the findings say the plan as a whole, including the repaired dam along the river front, contemplated that "the water flowing over this area which otherwise would have continued on toward Stockton should be intercepted by the canal and thus diverted to the Calaveras" (Rec. p. 9); and however much these waters were, and in whatsoever ways assembled, they, after overflowing the canal, did encounter the levee built to receive them and necessarily to drive them back upon the lands opposite, where they would remain until the canal and the river, through the subsidence within the banks, could receive them.

Also, in speaking of the work done on the lower reaches of the river, the findings say (Rec. p. 8):

> "In dredging the Calaveras below the mouth of the canal to increase the capacity of the river and care for the increased flow of water the dredged materials were placed on this levee up to a point a short distance above the mouth of the canal, and it was thereby very much widened and raised and strengthened. It was not made of such width and height as it was because of assumed necessity for so much strengthening, but because of the excess quantity of materials to be disposed of."

The case at bar has no concern whatever with the protective works on or in the Calaveras River and their sufficiency or insufficiency. (Some of the other cases have.) The sole subject of complaint here is, or was intended to be, that an ample embankment was constructed along the south bank of the diverting canal, as the final agency in the engineers' plan "for the rectification of the Stockton and Mormon Channels" and that it accomplished its purpose by stopping all the waters that, through one course or another, came within its influence and deposited them on the lands of this appellant and some others.

In describing this plan, as adopted, Assistant Engineer L. C. Eaton, who was its author and who was to have charge of the construction, said (Report of Chief of Engineers for 1899, Part 4, pp. 3192, 3193):

> "From elevations taken of high-water shown me by residents in the vicinity it would appear that the whole country is flooded in extreme high waters. To control this water, the material excavated from the channel can be placed on the lower side to form a levee. This will require raising the grade of the Stockton and Copperopolis railroad 4.5 feet at least to bring it up to the high water mark. The line of the proposed Lodi railroad crosses the canal at two

points. I do not know what their proposed grade is * * *.

"The proposed line begins at a point on Mormon Slough, on the ranch of James Gilliss, runs 73 degrees 30 minutes, west magnetic, 16,500 feet to a point near the Waterloo road; then deflects 5 degrees 30 minutes left, runs 8350 feet, and strikes the Calaveras River at the highway on the ranch of S. Sanguinetti. This location avoids all improvements except about 1030 feet of vineyard and orchard on the Sanguinetti place which can not well be avoided. It will require the construction of a trestle crossing the canal for the Stockton and Copperopolis railroad and perhaps also for the Lodi railroad; also the construction of four high bridges and the lengthening of the one at the lower end of the line, which is a new bridge. * * *

Major Heuer, the district engineer, in his report of the same time, said (ib. p. 3191), referring to Lieutenant Eaton's report and a tracing which accompanied it:

"In making the canal all the excavated material should be made into a levee on the west side of the canal. In enlarging the north branch of the Calaveras River the mass of the excavated material should be thrown on the south side of the river, with a view of forming a high levee between the river and the city. The proposed location of the diverting canal is governed by engineering and economical considerations."

Seven years later, in 1905, Colonel Heuer, in a California court, regarding this same improvement, testified that while depositories had to be found for the excavated matter it was unnecessary to build so much of that into a levee on the west side of the canal. "We did that," he says, "first to prevent the city from being flooded." (Hos. Doc. 256, sup., p. 29.) This testimony related entirely to the water and detritus diverted from Mormon Channel.

Colonel Heuer and some other engineers speak of the banks of the diverting canal indifferently as (1) "east" and "west" and (2) "north" and "south." All meant the same thing; the canal running considerably west of north, counting from Mormon Slough, and meeting the Calaveras River at a broad obtuse angle.

In the fall of the same year, 1911, in which the first overflow of the canal occurred, the local engineer officer in charge, in his report, said (Report of Chief of Engineers for 1911, Pt. 3, pp. 2560, 2561):

> "This canal was given a severe test during the early part of this year, when a succession of floods caused unusually high water several times, but the levee on the lower side of the canal proved ample to withstand all water turned into the canal. * * * The country to the east and north of the canal was flooded for several miles and damage was done to early crops, fences and buildings.
>
> * * * This canal, however, does not entirely fulfill the purpose of the project to keep material out of Stockton Channel. The south bank of Mormon Slough above the head of the canal is overflowed at high water and considerable quantities of detritus are carried down into the improved channel in Mormon Slough and will doubtless extend into Stockton Channel in the course of time. This had been foreseen and the city of Stockton and private owners informed. The diverting canal and levees protected the city of Stockton from being flooded two or three times during the rainy season."

The report on the "preliminary examination" of Stockton and Mormon channels, having in view the betterment of the protective works here in question, which is included in the report of the Board of Engineers printed in House Document 256, 63d Congress, 1st Session, speaks throughout of the flooding of lands, to the northeast of the diverting canal and its levee, which

occurred in 1911 and was anticipated to recur if the waters should rise so high again. It would not be correct to say that the levee, jointly with canal, caused the overflows in that area. These were caused ultimately by the levee alone, for the water already had overflowed the canal and but for the levee would have passed onward toward the city of Stockton, just as all the flood waters had done previously, and the levee was constructed to be a last and full defense of the country beyond, which could not be accomplished except by throwing the water onto the lands lying above the canal. Regarding the events of 1911, this report said (page 10):

> "The diverting canal therefore practically accomplished its purpose, as far as the United States is concerned, and it may be expected to prevent the deposit of silt in Mormon and Stockton Channels, except in times of extreme flood, when the water escapes over the south bank of Mormon Slough and so flanks the dam and embankment."

The embankment (levee) was not put there aimlessly; it had its own purpose and this purpose it accomplished when it was not flanked by waters which had not entered the canal.

Those decided cases alone which are cited by the Court of Claims in its opinion and on the brief of the Solicitor General, when correctly interpreted, clearly sustain the right of the present appellant to be compensated for the taking of his farm and appurtenances by flooding. The Court of Claims pretty well cleared the way for appellant's argument when it quoted the case of *Pumpelly* v. *Green Bay Co.*, 13 Wallace, 557, and said: "The overflow was caused by the erection of a dam across a river which was intended to back up the waters of the river, the result of which, clearly to be anticipated, was to overflow the lands in question." Surely it is not material that the purpose of the levee

in this case was to stop and throw back, instead of to back up, the waters; and the resulting overflow was no more anticipated in that case than in the case at bar.

In Lynah's case, 188 U. S. 445, a plantation had been flooded by seepage and percolation through an embankment built for the sole purpose of raising the level of the water in the river on which it abutted. This court (notwithstanding that the Government's engineers had not anticipated this seepage as one of the effects of the project) said the case was not essentially different from *Pumpelly* v. *Green Bay Co.* and overruled the decision of the Court of Claims which absolved the Government from liability.

The Court of Claims, for all that it charges appellant with "a tendency" to misconstrue the facts of Cress's case, 243 U. S. 316, itself says that the injury, redressed by the opinion of this court, was "a permanent condition, resulting from the erection of the lock and dam, by which the land is subject to frequent overflows of *water from the river*" and it takes note of this court's quotation from the Pumpelly and Lynah cases: "It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Appellant has no need to ask any different interpretation of the Cress case. It is only to be added, with reference to the paragraph at the top of page 22 of the opinion (Rec. p. 27) that "the effect of backwater caused by the dam in its usual and intended functions" is the matter at issue here as in the other case, the sole difference being that the function by which Sanguinetti was injured was occasional, while that of which Cress complained was constant.

The following extract from page 327 of the opinion of this court in the Cress case, having reference also to

the Lynah case and others, disposes of some other cases to which the opinion of the Court of Claims and the brief of the Solicitor General herein refer:

> "These cases have no proper relation to cases such as *Gibson* v. *United States*, 166 U. S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton* v. *Wheeler*, 179 U. S. 141, 153, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford* v. *United States*, 192 U. S. 217, 225, where the damage to claimant's land resulted from operations conducted by the Government six miles farther up the river; *Jackson* v. *United States*, 230 U. S. 1, 23, where owners of lands on the east bank of the Mississippi claimed compensation as for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees designed to prevent crevasses, retain the water in the river, and thus improve the navigation. In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether consequential, and the right to compensation was denied on that ground."

Another case of seepage is *Horstmann Co.* v. *United States*, 257 U. S. 138, from which the Solicitor General quotes at pages 24 and 25 of his brief. The land in question was some miles distant from the reservoir from which the water percolated. This court said:

> "That the result of the Government's work to the properties of plaintiffs could not have been foreseen or foretold is a necessary deduction from the findings of the Court of Claims. The court found that there is obscurity in the movement of percolating waters, and that there was no evidence to remove it in the present case, and necessarily there

could not have been foresight of their destination nor purpose to appropriate the properties."

In the instant case there necessarily was foresight as to the destination of the waters that would overflow the canal, and the purpose to avail of that destination, viz., the lands immediately north of the canal, is evident.

The court also said: "It would border on the extreme to say that the Government *intended* a taking by that which no human knowledge could even predict." Conversely, it would border on the ridiculous to say that the Government did *not* intend a taking by that very event which was foreseen and against which a special provision was made in the plan of the improvement.

If complaint were made here of the canal as the cause of the overflow north thereof, the Solicitor General's characterization of the canal as only contributory might be pertinent. His observation is *not* applicable to the factor of the project to which the injury really is charged, viz., the levee.

The Solicitor General (page 9) gives a rather hesitating assent to the conclusion of the Court of Claims that the correlated canal and levee were an engineering mistake. We respectfully submit that, as matter of law, there can be no mistake in a project which engineers of the United States have framed to meet conditions that actually existed or were expected to occur, whether permanently or at intervals. In other words, we believe we speak within bounds when we say that if the best engineers in the country, by dozens or hundreds, had testified in this case and said e. g. that the canal ought to have been made larger, so that it could not be overflowed, and the abutting lands injured, by any floods conceived of as possible, this would have been immaterial. (In fact there was no evidence.)

The only matter of any pertinence regarding the plan of the work is that it actually included, as an integral part, that particular structure which, in the situation contemplated, produced that effect of which the suit complains.

In reality, of course, the levee was wisely designed as protection of navigation in the Stockton Canal, and incidentally, of the city of Stockton itself. The only inadequacy of the project, if there were one, was in the omission of an embankment at the lower end of Mormon Slough sufficient to force all the water into the diverting canal and prevent any drift whatever to the south thereof. This, obviously, was not a function of the levee, which was coterminous with the canal. If the true function of the levee had not been performed—if the overflow from the canal itself had not been forced onto the lands on its north shore—this suit would never have arisen.

Naturally the Solicitor General has nothing to say of *Portsmouth Land & Hotel Company* v. *United States*, 260 U. S. 327, which is the last word of this court regarding diminished value of lands on the seashore caused by the actual or expected firing of guns from a Government proving ground on which the lands abutted. Two judgments in the same matter had previously been rendered by the Court of Claims, one against the same suitor and one against another, and both were affirmed by this court. In the case cited a demurrer was sustained by the Court of Claims and the petition dismissed. This court reversed that decision, saying in part:

> "The installation of a battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between it and the sea to the right and privilege of the

Government to fire projectiles directly across it for the purpose of protection or otherwise whenever it saw fit in time of peace with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation must be made." Also:

"Where acts amount to the taking of a servitude, an implied contract might be inferred."

The Findings of Fact.

The Solicitor General, mainly by a liberal interpolation of italics, constructs his argument, in section II (pp. 10–18), on certain parts of the findings made by the Court of Claims. Following are those parts with our brief comments:

1. That "floods were and are of almost annual occurrence;" but that "the cause of the damage here in question was "an unprecedented flood, unless the flood of 1862 may have been greater, as tradition has it." (Brief pp. 12, 13.)

Clearer proof could hardly be desired of the engineers' cognizance of probable high waters, exceeding the capacity of the canal, and their selection of a levee as the best means of restraining and disposing of this overflow.

2. Waters of the Calaveras River, in part backed up by the bridge or trestle of the Southern Pacific Railroad. (P. 14)

This bridge and trestle, while not those of which we have spoken above, were a datum of the engineers' plan and doubtless were considered when the height and strength of the levee were fixed. The agency of the levee in forcing the waters to the north side of the canal is not the less evident because, practically, it sufficed to

handle in that way all of the overflow waters, from whatever sources. In reality the flood waters of the Calaveras River flowed mainly to the south of the stream and, including, as they did, some water brought to the river by the canal, relieved the levee to that extent of pressure from the canal overflow.

3. That "to what extent these waters in 1911 would have accumulated on, flooded, or damaged these lands but for the canal does not specifically appear and is speculative." (P. 16.)

The ample extent to which these waters in 1911 *were* accumulated by the levee on these lands is not speculative and does clearly appear. All else is negligible.

4. That "it is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here involved or had any reason to expect or anticipate that such results would follow." * * *

That "the engineers of the United States reached the conclusion based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers." (Pp. 18–19.)

This means, as to each of the matters referred to, that there was no proof of any kind before the court. If there had been any proof, the court would have had to make a finding to the one effect or the other, e. g., that the officers of the United States "had no intention to thereby flood any of the lands here involved or any

reason to expect or anticipate that such results would follow," or that "the officers of the United States intended to thereby flood the lands here involved, when that necessity should arise, and had reason to expect or anticipate such results"; and the court will not be presumed to have abdicated its duty.

The only evidence that exists on these points, so far as we know, is in the successive reports of the army engineers. By a motion of claimant these reports were brought directly to the attention of the court, but the court refused to consider them. The fact that these reports were the only competent evidence, and therefore that the court had no evidence on which to base its finding, will be shown by a motion of appellant for a remand.

There is now before this court, in this form of engineering reports, sufficient evidence, we submit, to show that the levee in question was, and was considered by the engineers to be, an integral part of their plan and that they did anticipate, as probable, occasional overflows which, for accomplishment of their object, would require such a structure. This being true, and the court being assured that there is no countervailing evidence, it will give to those evidences their proper effect, notwithstanding that the Court of Claims has reached a different conclusion. This rule of law, with the corollary that a finding of the Court of Claims for which it is shown that there is no legal evidence has no sanctity, was set up in Clark's case, 96 U. S. 37, and obtains with full force to this day. In the following cases the same rule was declared, with another, viz., that where a conclusion of law as to a Federal right and findings of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts to the

extent necessary to do so, the power exists as a necessary incident upon the claim of the denial of a Federal right: *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 635; *Oregon R. R. Co., etc.* v. *Fairchild*, 224 U. S. 528; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601; *Carlson* v. *Curtis*, 234 U. S. 103.

"Denial of a Federal right" is a jurisdictional question; but so is the question of implied contract in the instant case.

The opinion of the Court of Claims (Rec. p. 29) says: "The conditions to be met certainly indicated that a strengthening of the southwest bank of the canal was good construction." Indicated to whom? To the Government's engineers, planning the improvement, of course. So thought *was* given to this levee and it was deliberately made a part of the plan.

It does not seem possible, however, that the intended function of the levee was that which the court has here suggested. The layman's guess is that such a load, not placed against the face of an embankment but superimposed on its top, rather weakens than strengthens it.

After hypothesizing some earlier time for the construction of the canal and levee, the Court of Claims (Rec. p. 34) says:

> "It happened that this extraordinary flood came the first year after its completion. Subsequent floods, following three years after, approximating but not equaling that of 1911, were aggravated by the fact that the canal had been permitted to fill up by deposits therein and its capacity was thus much reduced."

This case has nothing whatever to do with excessive floods subsequent to 1911, and their frequency, except as evidence of the engineers' foresight and purpose in

constructing the levee. Compensation is sought for the damage done by the floods of 1911 and none other.

The Pleadings.

Although the arguments of the Court of Claims and the Solicitor General profess to take into account all of the pertinent facts, both point out the inadequacy of the petition. That the petition failed to describe the damage, and its cause, with due particularity, and in other respects was not mature, when the case was submitted, we can not gainsay. But this, we say, is not chargeable to appellant or his counsel. That leave to file a proper petition, in the name of any claimant or claimants whomsoever, after the facts of the injuries were established, and leave to this claimant to file any petition whatever, were denied by the court when the occasion arose, will be shown by a motion seeking either that the petition in the record be considered as containing certain necessary averments or that the case be remanded to the Court of Claims with directions to permit the filing of a new petition.

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